

DEPARTMENT OF VETERANS AFFAIRS
ADVISORY COMMITTEE ON DISABILITY COMPENSATION

Minutes of the December 8, 2008 Open Session

Members present:

James Terry Scott, LTG, USA (Ret.), Chairman
Charles Battaglia
Robert Burke, Ph.D.
Thomas Carney, LTG, USA (Ret.)
Bonnie Carroll
Robert J. Epley
Major Daniel Gade
Richard Katz, M.D.
Deneise Turner Lott, J.D.
Edward R. Reese, Jr.

Member not present:

Ronald Blanck, D.O., LTG, USA (Ret.)

VA Staff present:

Ersie Farber, Designated Federal Officer (DFO)
Marcelle Habibion, VA Office of Policy and Planning
Vicki Milton, VA Compensation and Pension Service
Maya Ferrandino, VA Compensation and Pension Service
Jean York, VA Compensation and Pension Service
Keith Hancock, VA Compensation and Pension Service
Andrew Graf, VA Compensation and Pension Service
James P. Terry, Chairman, Board of Veterans' Appeals
Ruth Fanning, Director, VR&E Service
Tim McGrail, VBA
Roscoe Butler, VHA Chief Business Office
Rex Gilmore, VHA Chief Business Office

Members of the public present:

Victoria McLaughlin, McLaughlin Reporting (Court Reporter)
Michael Turner, Chief Congressional Affairs, Wounded Warrior Project
Emily Bruce, Health Policy Fellow, Wounded Warrior Project
Ralph Ibsen, Wounded Warrior Program, D.C.
Justin Constantine, Senate Veterans Affairs Committee
Christine Scott, Congressional Research Service
Gregory D. Whitney, Government Accounting Office
John L. Wilson, Disabled American Veterans
Jerry Manar, Veterans of Foreign Wars
Jim Wear, Veterans of Foreign Wars

John Davis, Fleet Reserve Association
Joe Wynn, Vietnam Veterans of America/NABETS National Capitol Area
Ali Sayer, Economic Systems Inc.
Ray Wilburn, Economic Systems Inc.
George Kettner, Economic Systems Inc.
Jo Ann Kuchak, Macro International

The session, which was open to the public, was held in the Carlton Ballroom of the St. Regis Hotel, 923 16th and K Streets, N.W., Washington, D.C., 20006.

General Scott called the first public meeting to order at 8:45 A.M., with ten of the eleven members present. Minutes from the October 30-31, 2008, meeting were distributed to the members with a request to contact Ersie Farber, the CFO, with any comments. General Scott explained that the committee would be developing further an analysis of the charter given to the committee by the Secretary. The three major areas of VA benefits to be examined are: transition benefits from military service to veteran status, quality of life, and examination of the VA schedule of rating disabilities (VASRD) in terms of what should be done and what sort of schedule should be set up to review the VASRD.

First, the General asked that the members think about what subcommittees should be established in order to accomplish the Committee's tasks. Second, he stated that one or two day meetings would be scheduled in January, February and March 2009. For two-day meetings, the first day would consist of presentations, with the second day for Committee or subcommittee discussions. The General then opened the meeting to Committee members for comments.

The first presentation was from Economic Systems, Inc. (EconSys), regarding a five volume report, entitled A Study of Compensation Payments for Service Connected Disabilities, prepared by EconSys for VA. The EconSys report, present primarily by George Kettner, focused on three main areas – a transition benefit, an analysis of the earnings (and earnings loss), and an analysis of quality of life (QOL) of disabled veterans. The transitional benefit would precede compensation benefits and would also consist of vocational rehabilitation support. Mr. Kettner explained that currently VA's Vocational Rehabilitation and Employment (VR&E) services are not generally used by recently discharged veterans. In fact, veterans have up to twelve years after being found eligible for VR&E to use the program. Most apply around age forty. In addition, the current subsistence allowance is not sufficient on which to live. As a result, it is not currently a transition benefit.

The EconSys recommendations for the transition benefits were to ease the financial burden of recently discharged, disabled veterans. The benefit would consist of a monthly housing, food and transportation benefit to offset loss of earnings and mandatory VR&E training or education. Mr. Kettner explained that

there were several options regarding who would be eligible for this benefit. These options included medically discharged veterans rated 70% or more within two years of discharge; or all medically discharged veterans and veterans rated 70% or more within two years of discharge or of being found eligible. Another set of options included these same groups but within twelve years of discharge or of eligibility.

Regarding the analysis of earnings loss as compared to VA compensation, Mr. Kettner explained that EconSys was not able to obtain information from the Social Security Administration (SSA) – due to privacy concerns – regarding earnings of individual veterans. [There was much discussion led by General Scott regarding the VDBC and the Dole Shalala Commission requesting SSDI information from SSA. In connection with this Committee, it was discussed whether Congress could be asked to “break down the barriers” in order that specific information could be obtained from SSA.] Rather, the SSA information was given as the earnings of groups of veterans.

There was discussion between LTG Carney and Mr. Kettner regarding whether the “norm” used for comparison was veterans or the general population – the norm was non-service connected veterans – though the data was only for veterans discharged in or after 1980 and was limited to that available from SSA. Mr. Kettner explained that more exact information was needed on the income of individual veterans from the SSA. EconSys found that veterans had a higher income than the general population and found that earnings of veterans increased as the number of service connected disabilities increased. This was not true at the 100% level. The analysis did not include those veterans in receipt of individual unemployability (IU) or special monthly compensation (SMC). It was noted that the most prevalent conditions for newly service-connected veterans were tinnitus, defective hearing, diabetes, and post traumatic stress disorder (PTSD).

Mr. Kettner explained the recommended options were: 1) to use a single table with a strong additive effect on combined rating, which is the current method; 2) to use a single table with a weak additive effect (to reflect actual wage loss); or, 3) to develop different rating criteria for different combinations of disabilities. Major Gade pointed out that the third option would result in inordinately large number of results.

General Scott asked Mr. Kettner to present to the committee a paper regarding areas in which EconSys felt needed further analysis. Mr. Kettner said EconSys would be happy to do that.

Lastly, EconSys presented their QOL analysis. Although VA does not currently compensate for loss of QOL, there is precedent for doing so in SMC payments, which are not based on loss of earnings. Mr. Kettner presented three options for compensating QOL. Dr. Katz had questions regarding the scale which showed

the difference between the QOL of SC and NSC veterans – which was confusing. Dr. Katz pointed out that skin impairments were showing less of a loss of QOL than mental health disabilities – which shows how subjective the measure is. Dr. Burke stated that if a policy decision were to be made, it would be likely PTSD would have a greater loss of QOL than many other disabilities.

At the close of the EconSys presentation, Chairman Scott explained that the Committee might ask EconSys back for a follow up session. Chairman Scott announced that there would be a ten-minute break.

Ruth Fanning, Director of VR&E, the next presenter, explained that VR&E exists in every VA regional office with 11,000 employees. The goal of VR&E is to help veterans with service connected disabilities to achieve maximum level of independence in daily living and or prepare for obtain and maintain suitable employment. There are currently four chapters under which VR&E provides benefits, Chapter 31, Chapter 35, for children and widows or spouses of permanently and totally disabled veterans, Chapter 36, educational and vocational counseling for service members within six months of exiting the military or veterans within a year of exiting the military and Chapter 18, vocational training and rehabilitation for children born with spina bifida whose parents are certain Korean or Vietnam veterans. To be eligible, veterans need to have (or expect to have) an honorable discharge, apply for vocational rehabilitation and have a memorandum rating of 20% or more from VA.

After a question from Chairman Scott, Ms. Fanning explained that Chapter 33 is a very generous program since it provides housing benefits for veterans who are enrolled in school, but to make this chapter available to more veterans some kind of legislation would be needed to amend title 38. In response to a question from Ms. Turner-Lott, Ms. Fanning explained that the timeframe within which eligible veterans utilize VR&E services varies but that it is decreasing and some enter the program while still on active duty. Ms. Carroll asked if VR&E had a relationship with Military.com – they are exploring it -- and if VR&E worked with the State Department of Veterans Affairs – they do.

Major Gade and LTG Carney talked about the utilization of one examination – military or VA – being used for veterans for memorandum ratings as well as regular rating decisions.

In response to a question from Ms. Carroll, Ms. Fanning said she would get back to the Committee about the Voc Rehab budget.

Mr. Epley asked Ms. Fanning about utilizing Voc Rehab in the determination of individual unemployability. Ms. Fanning noted that Voc Rehab could adapt to such a role but expressed concern that interjecting a Voc Rehab counselor into a possible appellate process could taint the counselor's role as a veteran advocate. She noted that on the reverse side, if a young veteran were rated unemployable,

the 100% rating could become “golden handcuffs”. She noted that regulatory criteria would have to be changed to interject VR&E into the claim or rating process.

Chairman Scott asked if legislation to improve subsistence benefits for VR&E participants had been written or proposed. Ms. Fanning replied that such legislation has been studied but not proposed. Chairman Scott noted that VA did not support Senator Webb’s proposal regarding this type of benefit. Chairman Scott thanked Ms. Fanning and noted that she might be called back in the future.

At noon, the Chairman Scott recessed the Committee for lunch. The Committee reconvened at 1:10 p.m.

Mr. Roscoe Butler, Deputy Director, Business Policy of Veterans Health Administration (VHA) presented information about VA healthcare costs and categories. Mr. Butler explained that there are eight enrollment priority categories for VA healthcare services.

Chairman Scott asked if it were true that non-veterans could enter the VA healthcare system. Ms. Carroll also noted that there was a policy of providing services to all who walk through the door. Mr. Butler explained that on rare occasions that has happened but it is not the norm – that VA’s verification process through the Health Eligibility Center in Atlanta does not usually allow for such misuse.

Chairman Scott asked about the process for determining eligibility through a vet center as opposed to a VA healthcare center. Mr. Butler stated that he was not familiar with the vet centers’ eligibility process but that Dr. Alfonso Batres, the Program Director for the vet centers, was and that he could report back to the Committee on whether there was a problem with eligibility verification.

Dr. Burke asked about emergency care for non-veterans as well as veterans under EMTALA rules and regulations. Mr. Butler noted that although VHA does not fall under EMTALA authority, it does follow the same rules and regulations.

Mr. Reese asked about priority group 6 and treatment for those veterans who may have been exposed to Agent Orange. Mr. Butler explained that the authority for treating those veterans expired in December 2002, although VA had, on a number of occasions, requested authority to reestablish that authority.

Chairman Scott asked that Mr. Butler report back to the group with a document that would show the number of enrollees in each of the eight categories and the cost associated with each. Mr. Butler noted that VHA Office of Policy and Planning tracks that information. Mr. Battaglia asked that the information be expanded to include projections in those categories for the future. Mr. Butler was to present this information to Ms. Farber, the DFO.

Mr. Butler also stated that next year, once the new administration takes office, enrollment would be opened up to any veteran in Priority Category 8 who has income ten percent above the VA means test and GMT threshold.

LTG Carney asked if capacity to serve veterans was a regional issue as opposed to a national issue. Mr. Butler explained that it did appear that capacity to serve was a regional issue – that some facilities have more veterans to serve than others. The Chairman ended the session by telling Mr. Butler that if the Committee had more questions they would be submitted to VHA through Ms. Farber and Mr. Butler assured the General that the information would be submitted back through Ms. Farber.

Next was open discussion among the Committee members. The Chairman, Major Gade and Mr. Battaglia noted that based upon information from the Secretary and members of Congress, the Committee's mandate was broader than the charter indicated. It was suggested by Mr. Battaglia that the Committee set up its own priorities to include transition, QOL and the rating disability schedule. The Chairman stated that the three areas the Committee would address were: transition benefits, the revision and updating of the VASRD, and recommendations regarding QOL. He emphasized that the Committee would stick close to its Charter mandate with an eye to short term and long term recommendations.

Ms. Carroll noted it would be helpful to the Committee to hear from Dr. Loree Suttan and the Center for Excellence and from Dr. Batres regarding the Vet Centers. She noted PTSD and traumatic brain injury (TBI) were focal points on reevaluating compensation.

Mr. Epley talked about the new TBI regulations. He noted that the method of drafting the TBI regulations, using medical experts both internal and external to VA, and the format of the regulations was a good model to follow for drafting future regulations. The Chairman noted that PTSD rating criteria are to be revised, Mr. Epley said the new PTSD regulations were not yet out.

The Chairman noted that at the next meeting, the Committee would need a VA person to give the status of the new PTSD regulation to include methodology being used. The Chairman also pointed out that the backlog of VA claims was of concern on the Hill. LTG Carney noted that the Department of Defense (DoD) might also be in part responsible for the delays and backlog in connection with the processing VA claims. The Chairman also said that standardization of ratings across the 57 regional offices was of concern and that a VBA representative should present to the Committee about standardization efforts, nature of the backlog and the status of PTSD regulation revisions. Mr. Epley also stated that standardization concerns included lack of consistency and variance in ratings among the stations.

The Committee, in particular Mr. Battaglia, Mr. Epley and Chairman Scott, talked about the need to have a permanent staff to oversee and drive the revision of the rating schedule, that up until now it was a one-person operation consisting of Dr. Carroll McBrine.

There was discussion about the three areas of concern. Major Gade asserted that the VASRD does have a component of QOL built into it. He also noted that before QOL is addressed, the problems in the VASRD must be addressed. Chairman Scott and the Committee noted that compensating for QOL could be quite complicated, but that there could be an additive at the 100% level. For example, perhaps a 20% additive was not unreasonable. General Scott discussed subcommittee breakouts possibly along the three areas of consideration – transition benefits, QOL benefits and the revision of the VASRD.

Regarding QOL, Dr. Katz summarized the EconSys report as noting that QOL decreased about 10% at the 10% disability level up to a decrease of 30% at the 100% level from a linear viewpoint, that it was variable and not predictable among similarly disabled veterans, and that the mental health and pain areas showed the most loss of QOL.

Major Gade noted that two important issues were: that there should be a generous transition benefit at the time of transition into civilian life, and that the goal of the benefit should be transitioning a high functioning soldier to a maximally functioning veteran with a disability. He emphasized the need for an adequate VR&E system. He envisioned transition benefits as falling into two categories – the emergency or acute phase and the long-term maintenance phase. He opined that a labor economist should be on the committee to talk about how people respond to financial incentives. He pointed out that he would do research and make recommendations.

Mr. Reese explained that the GI bill and loan guarantee program is what built the middle class in America – that a bridge should be built between VA benefits such as the GI bill, VR&E and healthcare in order to make sure veterans have the incentive to complete a program of education.

Following a short break, the Chairman of the Board of Veterans' Appeals (BVA or Board), James P. Terry, gave an overview of the work of the Board. Mr. Terry talked about workload and that the Veterans' Law Judges had to sign a minimum of 752 decisions a year. He noted that 43,757 appeals were decided in 2008. The backlog of cases at the time of his presentation was 17,250, down from 22,000 in 2005.

The BVA is conducting a pilot program in connection with VBA entitled the "Expedited Claims Adjudication Initiative." The program permits a veteran to opt for a fast tract processing of his/her claim when the veteran states that all

evidence has been submitted. One legislative change that Mr. Terry noted would speed up the processing of claims was closing the record at some reasonable point in time. In response to questioning and comments from Mr. Epley and Mr. Reese, Mr. Terry stated that the BVA is in favor of closing the record at some point.

In response to a question from LTG Carney regarding when a veteran could expect to receive his or her first check, Mr. Terry noted that there are 840,000 claims filed at the agencies of original jurisdiction (AOJ) per year, 45% of which are new claims. Of the 840,000 claims filed per year, 61% ultimately are awarded benefits at the AOJ. Of the 320,000 denied claims, 44,000 are appealed to the BVA, 21% of those, or 11,000 are awarded benefits and 18,000 are remanded for further development. So the delay is when the claim is not granted by the AOJ. Also, more than half of the appeals to the BVA are from veterans already getting benefits.

Mr. Battaglia asked Mr. Terry about the new paperless system, which Mr. Terry said the BVA would move toward within the year. Mr. Terry noted that the BVA was working with VBA and the Court of Appeals for Veterans Claims in order to develop the paperless processing of veterans' claims. One problem he noted was that the Court of Appeals for the Federal Circuit's Rule 9 still requires a paper record in every case.

Chairman Scott asked how – in terms of timeliness – the new law permitting attorneys to represent claimants for a fee at the regional office level impacted the claims process. Mr. Terry said that between 7% and 8% of veterans were represented by attorneys and the impact in terms of timeliness was minimal. Chairman Scott thanked Mr. Terry for his remarks and opened the meeting to the Committee for discussion.

Dates for future meetings were discussed in January and it was decided the meeting would be Monday, January 12, 2009. The 9th or 23rd of February were considered. The 9th of March was considered as the primary date and the 10th as a secondary choice. Ersie Farber was to check out the dates as far as attendance and hotel conference room availability and get back to Chairman Scott.

In the final discussion, Chairman Scott stated that he sensed the Committee wanted to stay as one committee through the next meeting before breaking into subcommittees. He also stated he would summarize where the Committee stood regarding each of the three areas (transition benefits, QOL and revision of the VASRD) and what would be the next step for each area.

Chairman Scott noted there is a perception on the Hill that VA is dragging its feet regarding the revision of the rating schedule, that there needs to be a timeframe for revision. He also noted that it is not true that the schedule has not been

changed since 1933, that there have been many revisions since that time. He stated that the Committee needs to recommend to the Secretary a schedule for review of the VASRD and within that schedule should be prioritizing of what should be reviewed first. In addition, the Committee might recommend a certain number of people needed to be hired by VA in order to revise the VASRD.

He also noted that the coding was not adequate to cover all disabilities, and that the mental disabilities seem to be under compensated at the 100% level -- that perhaps the Committee could recommend a range of levels.

Mr. Battaglia recommended establishing an oversight office within VA that would be fully staffed and with reporting requirements on semiannual or annual basis. The Chairman agreed with the concept.

The Chairman stated that he would like Dr. McBride to make a presentation to the Committee about revisions to the VASRD. Mr. Epley mentioned that Brad Flohr, the Assistant Director for Policy within C&P service is responsible for drafting, revising and amending regulations. Mr. Reese mentioned that the Office of Regulation, Policy and Management within the General Counsel's office is a regulation clearinghouse within VA. Mr. Reese noted that Bill Russo of the VA's Office of Regulation, Policy and Management was leading the group who was charged with rewriting Part 3 of VA's regulations (title 38 of the Code of Federal Regulations) and that he was doing a good job.

Mr. Reese talked about using the TBI regulations as a model, and noted that both Brad Flohr and Bill Russo should be presenters at the next meeting. Chairman Scott agreed. Also, Mr. Reese mentioned that the IOM study on presumptions was well done. The Chairman asked Ersie Farber to get IOM booklets on presumptions and send them out to the committee members.

Mr. Reese asked about an Executive Director to support the Committee and the Chairman said he had some ideas from within VA.

Prior to adjourning, Mr. Epley asked if there were a compendium of transitional benefits that the Committee could use to identify the largest and most worrisome gaps. He noted that one of the presenters was not familiar with traumatic SGLI and this concerned him. Mr. Reese pointed out that the Senior Oversight Committee might have the single best collection of VA/DoD data. The Chairman stated that he would contact Roger Dimsdale, the Deputy Executive Director, to see if there were such a study.

Enclosed is a list of possible action items.

Chairman Scott adjourned the meeting at 4:30 p.m.

Jean York
Preparer of Minutes, Compensation and Pension Service

Ersie Farber
Committee Manager and Designated Federal Officer

General James Terry Scott, USA, (Ret.)
Chairman

Possible Action Items:

The Chairman discussed whether legislation was needed to obtain non-service connected veteran data (about earnings amounts) from SSA.

EconSys was to prepare a paper regarding areas in which EconSys felt further analysis was needed.

Ruth Fanning, Director of VR&E was to give Ersie Farber, the DFO, information regarding the Voc Rehab budget.

It was suggested by Ms Carroll that both Dr. Alphonse Batres, the Program Director for Vet Centers, and Dr. Loree Suttan, of the Center for Excellence make presentations to the Committee. Dr. Batres was to talk about, among other things, whether the verification of veteran status was sufficient or faulty at Vet Centers.

Mr. Roscoe Butler, Deputy Director, Business Policy, VHA, was to give Ms. Farber information regarding the number of enrollees in each of the eight priority categories and the cost associated with each. To the extent possible, the information should be expanded to include projections for the future. Current information should be passed on to Ms. Farber before the projected information if projected information is not readily available.

The Chairman mentioned that he would like Dr. Carroll McBrine to talk to the Committee regarding the method used to develop the TBI regulations.

The Chairman wanted Brad Flohr, the Assistant Director for Policy, C&P service to make a presentation at the next meeting regarding current and future work on regulation drafting to include the VASRD.

The Chairman wanted Bill Russo, of the Office of Regulation, Policy and Management within the General Counsel's office, to present at the next meeting his methodology for revising the regulations in part 3 and any future projects in the works.

The Chairman wants to discuss the formation of subcommittees at a future meeting. It was noted that, possibly, subcommittees would breakout into the three areas of focus – transition benefits, QOL, and revision of the VASRD.

The Chairman wanted a VA person to present to the Committee information about any efforts to standardize, or make more consistent, the rating process among and within all 57 regional offices.

Major Gade suggested that a labor economist be a member of the Committee to talk about how people respond to financial incentives.

Dates need to be fixed for Committee meetings for March 2009 and after.

The Chairman asked Ms. Farber to get for each of the Committee members booklets of the IOM study on VA presumptions.

The Chairman was to contact Roger Dimsdale, the Deputy Executive Director of the Senior Oversight Committee, to see if there was information that could be obtained about transition benefits.